

No. 20-443

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DZHOKHAR A. TSARNAEV

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

**JOINT APPENDIX
(VOLUME 3)
(REDACTED VERSION)**

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 5, 2020
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO
UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV

Filed: Dec. 30, 2014

**GOVERNMENT'S MOTION IN LIMINE TO
PRECLUDE ANY REFERENCE TO WALTHAM
TRIPLE HOMICIDE OR OTHER ALLEGED BAD
ACTS OF TAMLERAN TSARNAEV**

The United States of America by and through its undersigned counsel, respectfully moves for an order in limine precluding Tsarnaev during both the liability and penalty phases of trial from making any reference to a triple homicide that occurred in Waltham, Massachusetts on September 11, 2011, or any other alleged bad acts of Tamerlan Tsarnaev. As grounds for this motion, the government states the following.

BACKGROUND

On September 11, 2011, three men were murdered in an apartment in Waltham, Massachusetts. The men were bound, their throats were cut, and at least one of them had marijuana sprinkled over his body. All three men were known to be drug dealers; one of them, Brendan Mess, was

a close friend of Tamerlan Tsarnaev's. The Middlesex District Attorney's Office ("Middlesex") investigated the crime immediately after it occurred, but made no arrests.

After Tamerlan Tsarnaev was identified as one of the Marathon bombers, FBI agents began to interview his former friends and associates. Massachusetts State Police ("MSP") officers assigned to the Middlesex CPAC Unit were invited to attend some of those interviews. One individual interviewed by both FBI and Middlesex was Ibragim Todashev. After several interviews, Todashev told police that he and Tsarnaev had both participated in the Waltham triple homicide. Todashev then attacked one of the MSP officers, and an FBI agent fatally shot him.

Middlesex has informed the government that its investigation of the Waltham triple homicide is active and ongoing. The investigation is not joint; it is being conducted by Middlesex alone. Middlesex has not permitted the government to access its investigative files and, with extremely few exceptions, it has declined to inform the government about any of its investigative steps.

All reports of interviews with Todashev in the government's possession, custody or control were previously provided to the Court for in camera review. Those reports show that Todashev implicated himself and Tamerlan Tsarnaev in the Waltham triple homicide only once, during his final interview. The government possesses no other evidence that Todashev and/or Tamerlan Tsarnaev actually participated in the Waltham triple homicides.

ARGUMENT

1. Evidence of the Waltham murders is irrelevant

The Court should preclude any reference at trial to the Waltham triple homicide because the homicide, and Tamerlan Tsarnaev's alleged involvement in it, is not relevant to any issue in the case. Even assuming for the sake of argument that Tamerlan Tsarnaev actually participated in the murders, his participation would not make it any more or less likely that the defendant is guilty of the crimes charged in the Indictment. Similarly, his participation would not make the existence of any aggravating factor less probable or the existence of any mitigating factor more probable.

Although the defendant has informed the government that he will seek to prove in the penalty phase that “[b]ut for the influence of his older brother Tamerlan, the defendant would not have committed any of the crimes of which he has been convicted,” he has never alleged that he actually knew or believed that his older brother committed the Waltham murders, let alone that such knowledge influenced him to commit the crimes charged in the Indictment. Absent evidence that the defendant in fact believed his brother had committed the Waltham murders and was influenced to commit the crimes charged in the indictment by that belief, the entire issue of the Waltham murders is irrelevant. And even then, only evidence of the defendant's belief itself would be relevant; evidence that Tamerlan Tsarnaev actually participated in the murders would remain irrelevant.

2. Any reference to the Waltham murders would be more prejudicial than probative.

Reference to the Waltham triple homicide also should be excluded on the ground that “its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” 18 U.S.C. § 3593. The probative value of that evidence is minimal, not only because it is irrelevant, but also because it is so unreliable.

The evidence of record that Tamerlan Tsarnaev actually participated in the Waltham triple homicides consists entirely of a statement from someone who was confessing his own participation in the murders, and thus had an obvious motive to try to shift the blame to someone else—someone who, conveniently, had died, and therefore could no longer deny it. It also came from someone who obviously was not of sound mind at the time, because he interrupted the writing of his confession to attack two armed law enforcement agents with a sword. Todashev himself, of course, is dead, and therefore cannot be cross-examined about the truthfulness or accuracy of his statements. Under the circumstances, the evidence is too flimsy and unreliable to have any probative value at all.

Reference to the Waltham murders is also likely to confuse the jurors. Any such reference will inevitably trigger a “mini trial” on whether Todashev and/or Tamerlan Tsarnaev actually participated in the murders, which in turn could lead to the admission of a great deal of information having nothing to do with the crimes charged in the Indictment. In a case involving thirty crimes that occurred in different cities over the course of several days and generated hundreds of items of evidence, the jury should not be forced to digest information about an entirely separate independent crime occurring 18 months earlier.

Finally, reference to the Waltham murders will almost certainly mislead the jurors into believing that a comparison of Tamerlan’s character and the defendant’s character is a relevant consideration in recommending a sentence. It is not. The law requires the sentencing jury to focus entirely on the defendant’s background, record, character, and the circumstances of the offenses of conviction. See 18 U.S.C. § 3592; Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978)

(holding that neither Constitution nor FDPA “limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense”); United States v. Purkey, 428 F.3d 738, 756 (8th Cir. 2005) (FDPA does not give “the defense . . . carte blanche to introduce any and all evidence that it wishes).” Although the jury may consider as a mitigating factor the Tsarnaev brothers’ relative responsibility for the offenses of conviction, see 18 U.S.C. §§ 3592(a)(3), they may not spare the defendant merely because his brother was a “worse criminal” or more reprehensible person based on other criminal acts. Reference to the Waltham murders risk misleading the jury into doing so.

3. Evidence of other alleged acts by Tamerlan Tsarnaev should likewise be excluded as irrelevant and more prejudicial than probative.

Mention of any other bad acts by Tamerlan Tsarnaev should likewise be excluded as irrelevant and more prejudicial than probative. As noted above, bad acts unrelated to the charged crimes may not be offered to show that Tamerlan Tsarnaev was somehow “worse” than the defendant, and, in any event, the “mini trials” certain to arise over them will inevitably confuse and mislead the jury.

WHEREFORE, the government respectfully moves the Court in limine to preclude any reference to the Waltham triple homicide or Tamerlan Tsarnaev’s alleged participation in it, as well as to any other bad acts by Tamerlan Tsarnaev, at both the penalty and sentencing phases of trial.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ WILLIAM D. WEINREB
WILLIAM D. WEINREB
ALOKE S. CHAKRAVARTY
NADINE PELLEGRINI
STEVEN MELLIN
Assistant U.S. Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this document will be sent by electronic mail to Dzhokhar Tsarnaev's attorney, Judy Clarke, Esq., on December 29, 2014.

/s/ WILLIAM D. WEINREB
WILLIAM D. WEINREB

UNITED STATES DISTRICT COURT

for the District of Massachusetts

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)
1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9

Case No. 13-MJ-224-MBB

APPLICATION FOR A SEARCH WARRANT

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property (identify the person or describe the property to be searched and give its location):

1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9, as described in Attachment A located in the District of Massachusetts, there is now concealed (identify the person or describe the property to be seized):

evidence, fruits and instrumentalities of violations of 18 U.S.C. §1951 (Robbery Affecting Interstate Commerce), 18 U.S.C. §1519 (Obstruction of Justice), 18 U.S.C. § 924(c) (Use of a Firearm during a crime of violence), 18 U.S.C. §1001 (Providing False Material Information), and 371 (Conspiracy to Commit Offenses), as described in Attachment B

The basis for the search under Fed. R. Crim. P. 41(c) is (check one or more):

- [x] evidence of a crime;
[x] contraband, fruits of crime, or other items illegally possessed;
[x] property designed for use, intended for use, or used in committing a crime;
[] a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Table with 2 columns: Code Section, Offense Description. Rows include 18 U.S.C. §§1951, 1519, 924 (c) 1001, 371 and their corresponding offense descriptions.

The application is based on these facts: See attached Affidavit of Special Agent Steven A. Kimball

- [x] Continued on the attached sheet.
[] Delayed notice of days (give exact ending date if more than 30 days:) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

Signature of Steven A. Kimball, FBI Special Agent

Sworn to before me and signed in my presence.

Date: 06/03/2013

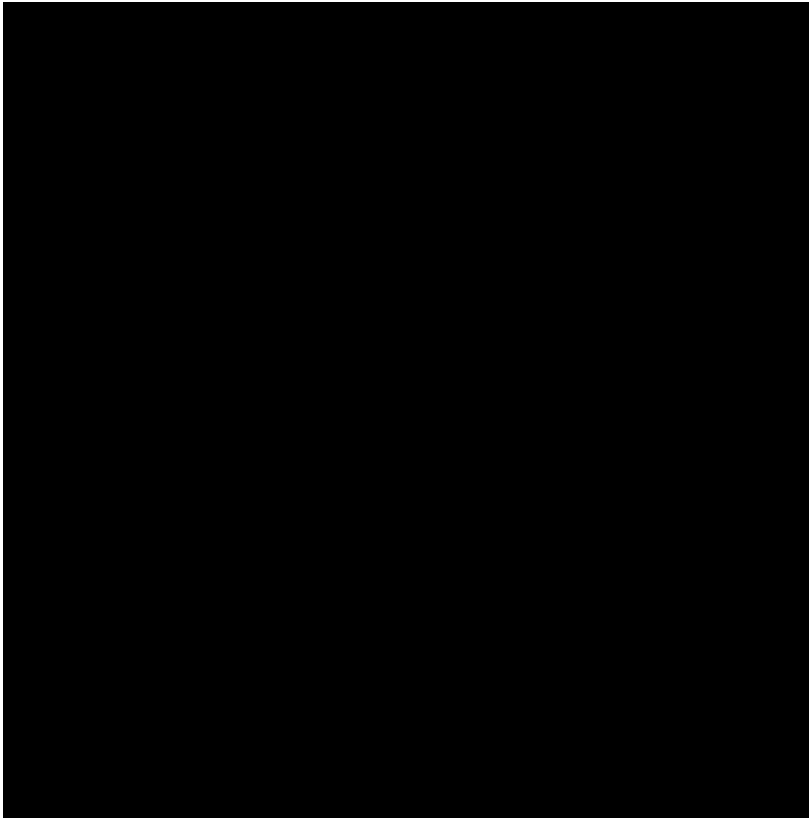
Signature of Marianne B. Bowler, USMJ

City and state: Boston, Massachusetts

Hon. Marianne B. Bowler, U.S. Magistrate Judge
Printed name and title

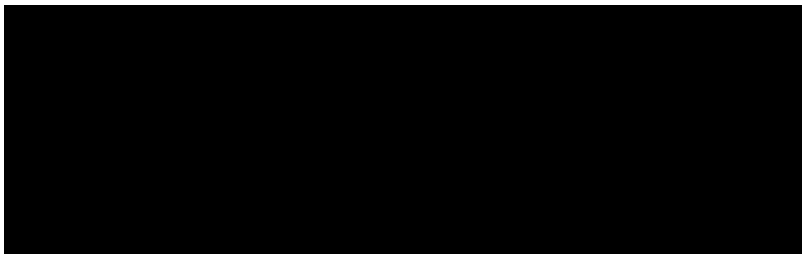
AFFIDAVIT OF SPECIAL AGENT

I, [REDACTED] being duly sworn, depose and state:



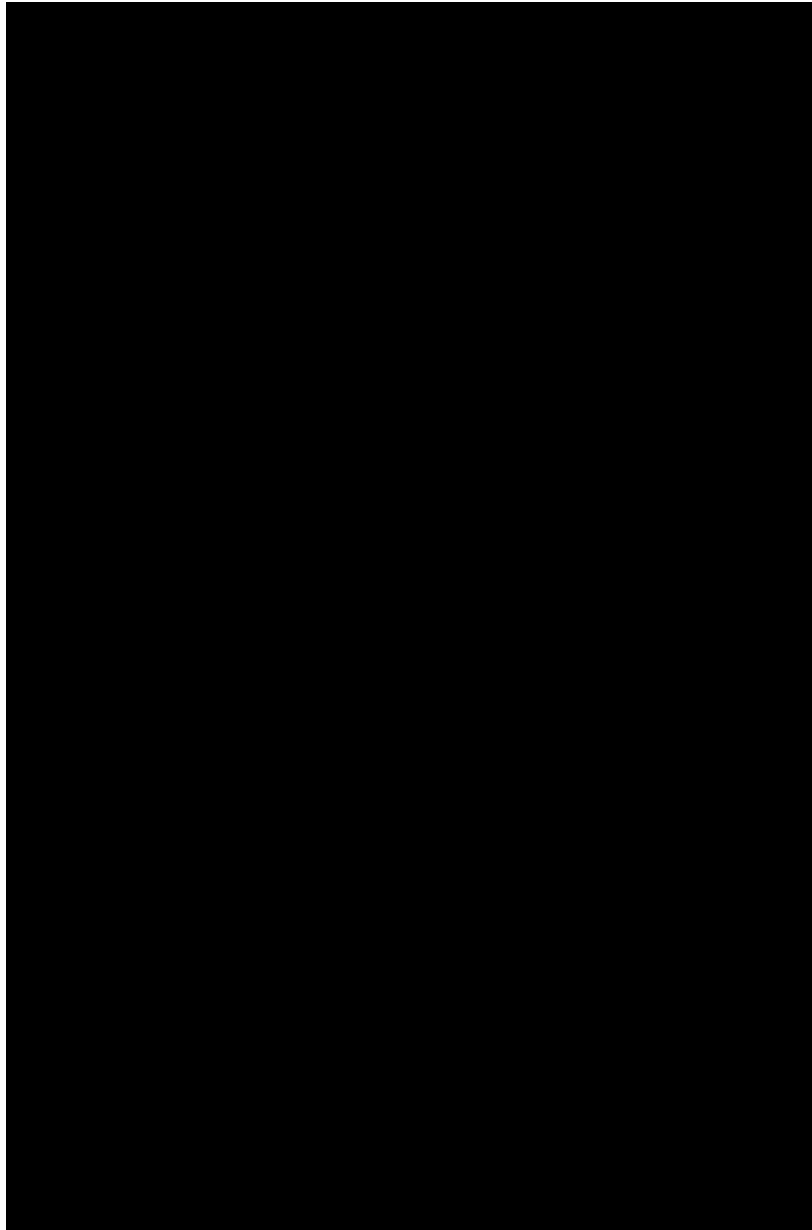
3. I am currently participating in the investigation of the two explosions that occurred on April 15, 2013 in Boston during the Boston Marathon and a subsequent carjacking and shootout that occurred on April 18-19, 2013 in Cambridge and Watertown, Massachusetts. I believe that the same individuals, Tamerlan Tsarnaev (“Tamerlan”) and his brother Dzhokhar Tsarnaev

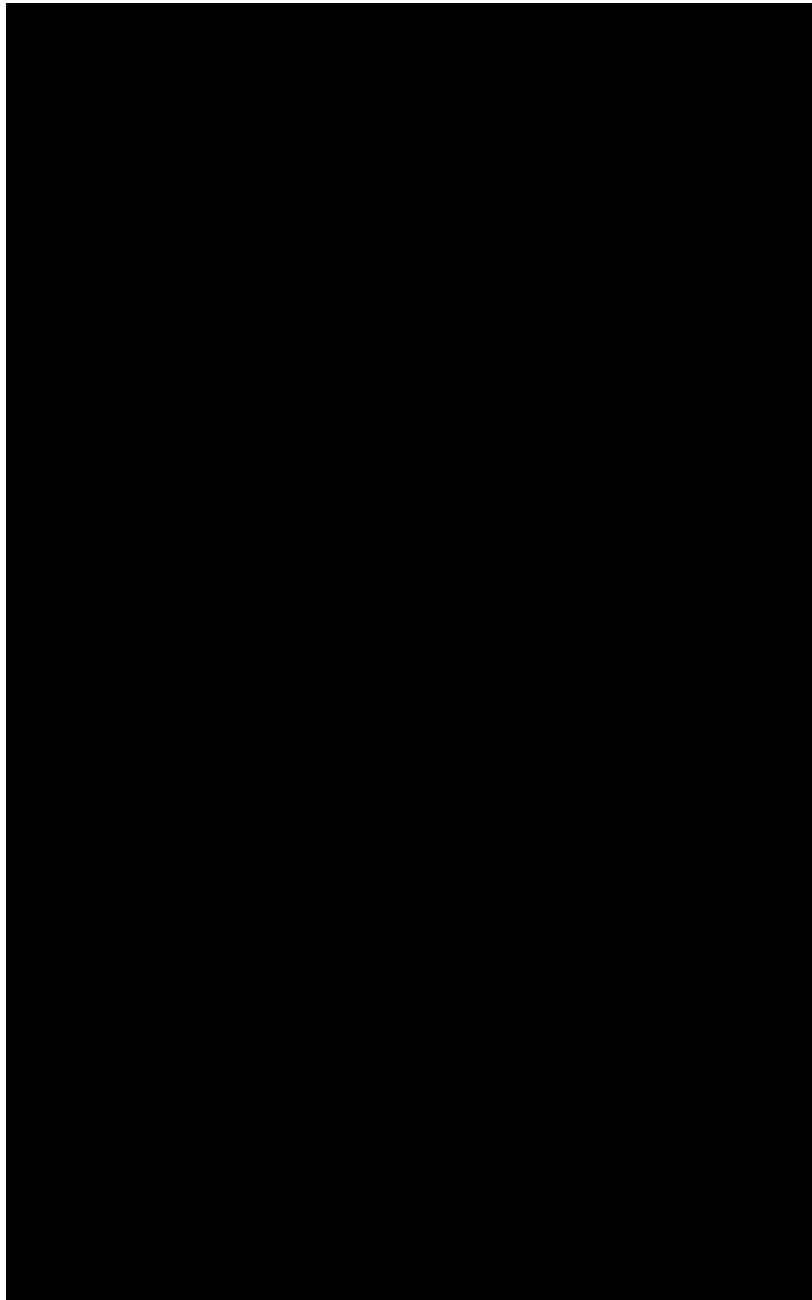
(“Dzhokhar”), were involved in the Marathon bombing, the carjacking, and the shootout. This affidavit is submitted in support of a second search warrant for a **1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9** (“the Target Vehicle”), as more particularly described in Attachment A hereto, which is incorporated herein by reference.¹ As set forth below, the Target Vehicle is the vehicle of Tamerlan and Dzhokhar. This requested second search warrant seeks a limited search of the Target Vehicle to seize blood, DNA, trace evidence and other items, all of which are more fully described below, that may have been transferred to or from the vehicle by Tamerlan or Ibragim Todashev (“Todashev”), one of his associates, after a triple murder that occurred in Waltham, Massachusetts in September 2011. I have probable cause to believe these additional items may be evidence of the commission of criminal offenses, in violation of 18 U.S.C. §§ 1951 (Robbery Affecting Interstate Commerce), 924(c) (Use of a Firearm During a Crime of Violence), 1519 (Obstruction of Justice) and 371 (Conspiracy to Commit Offenses).

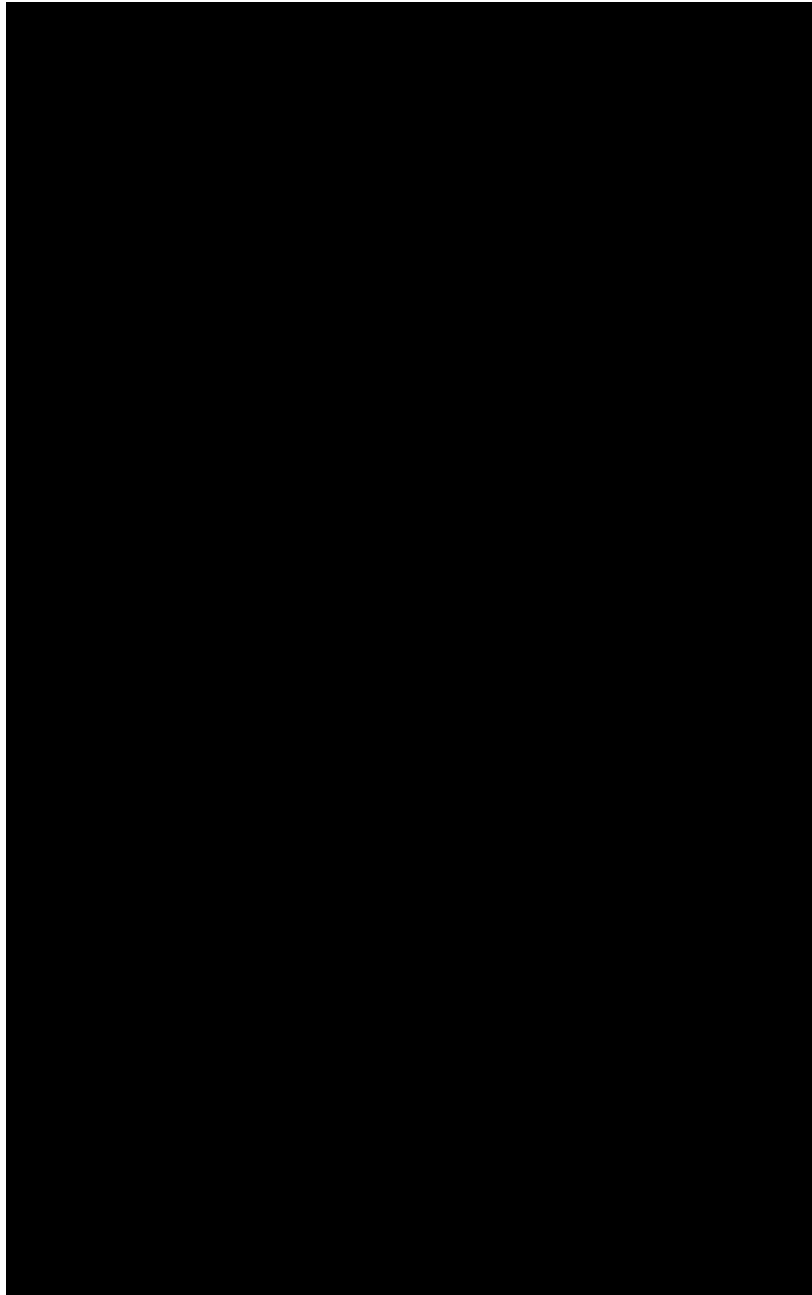


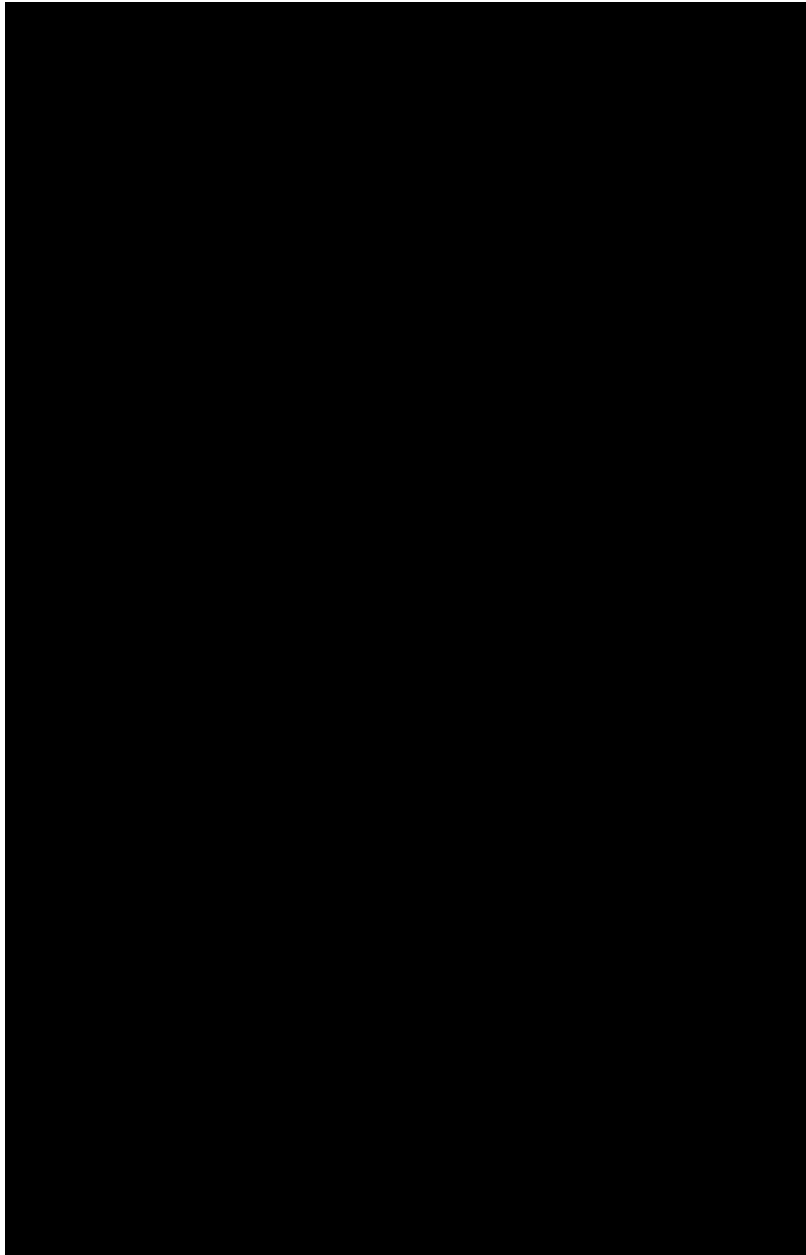


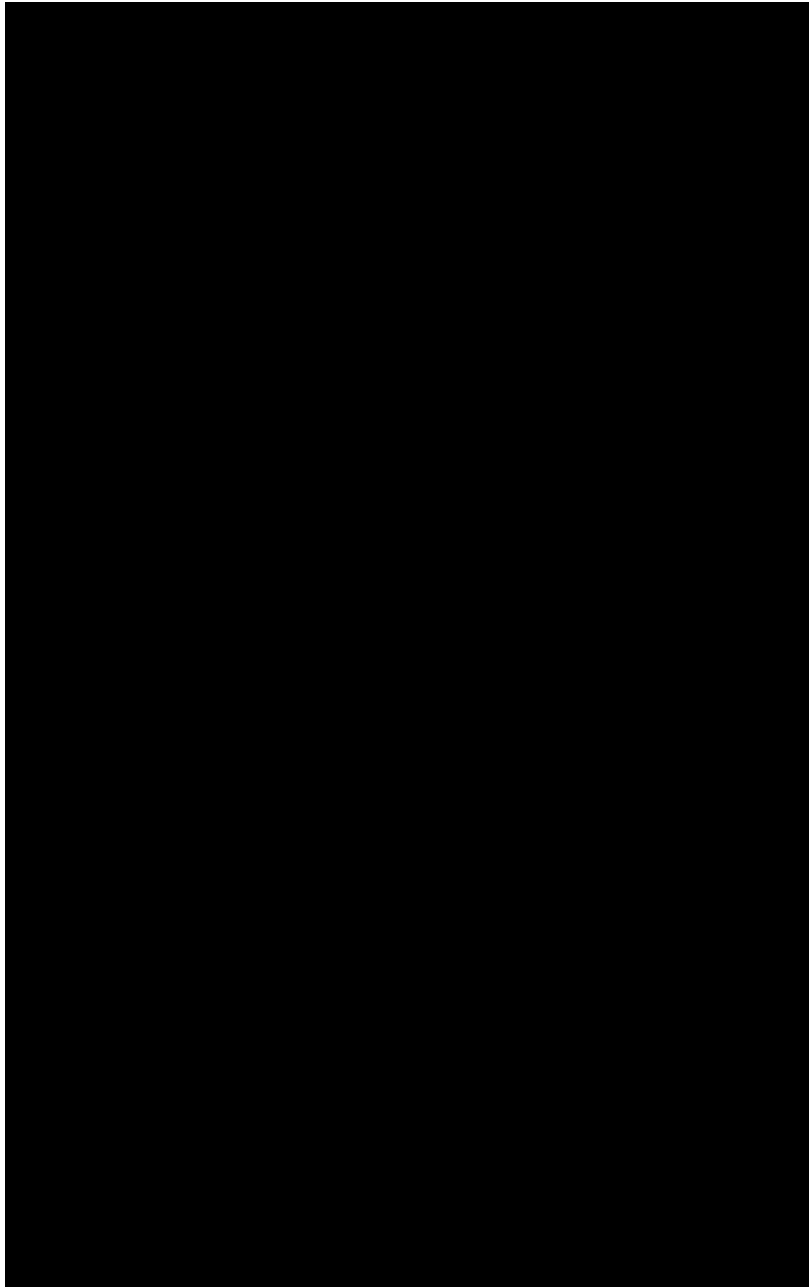


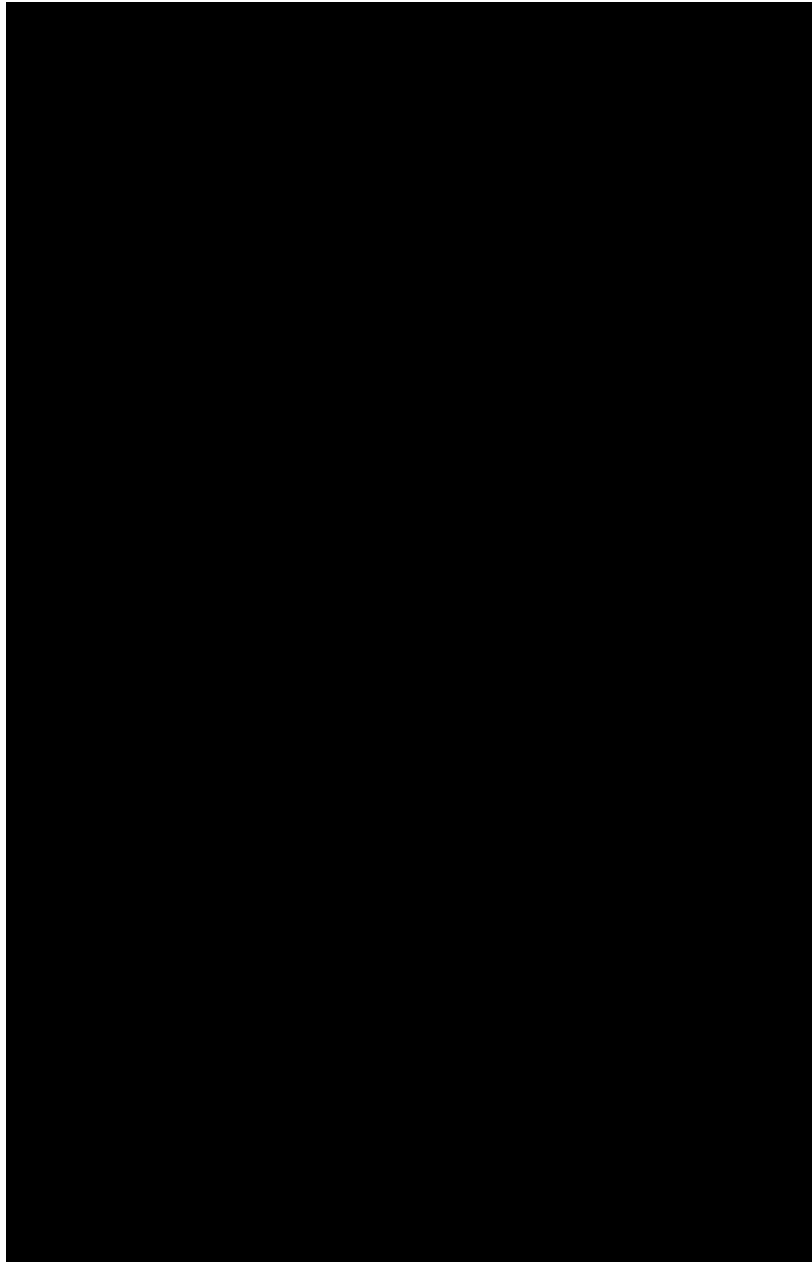


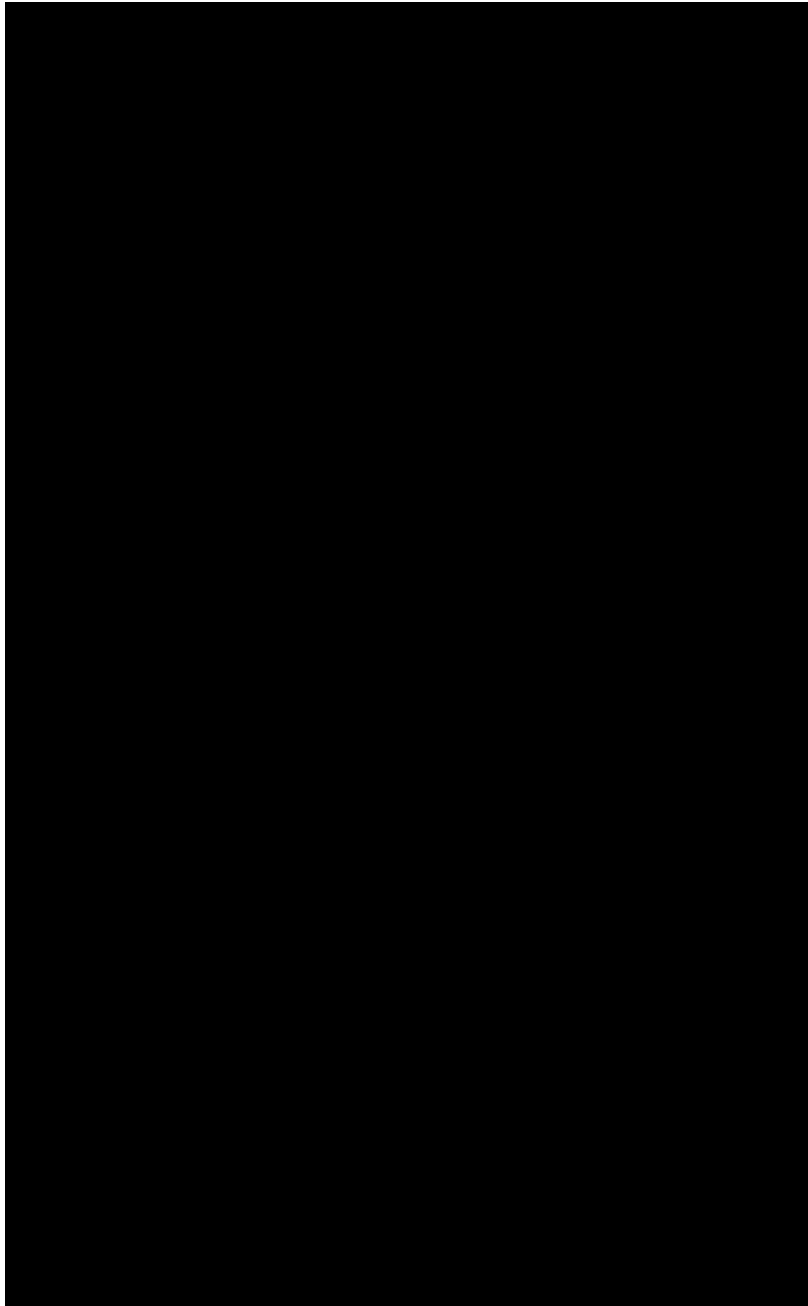


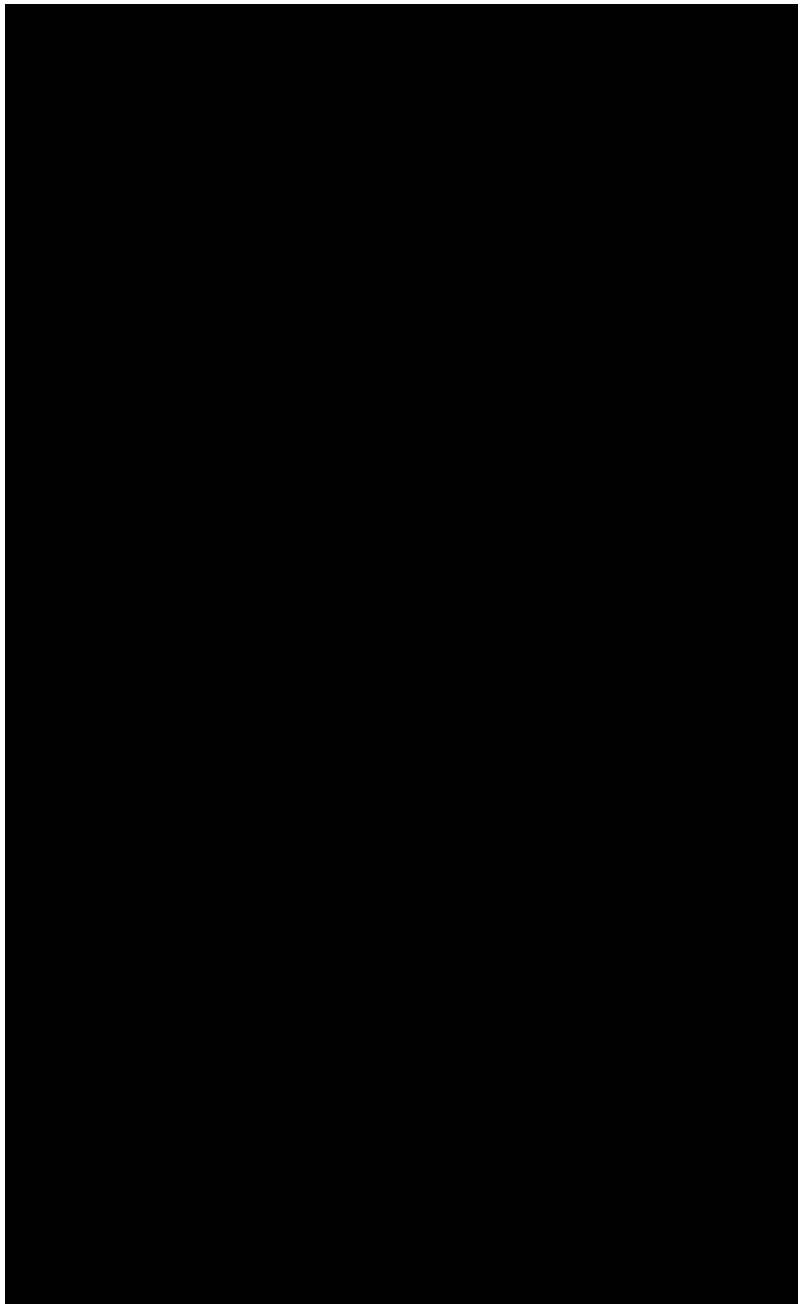


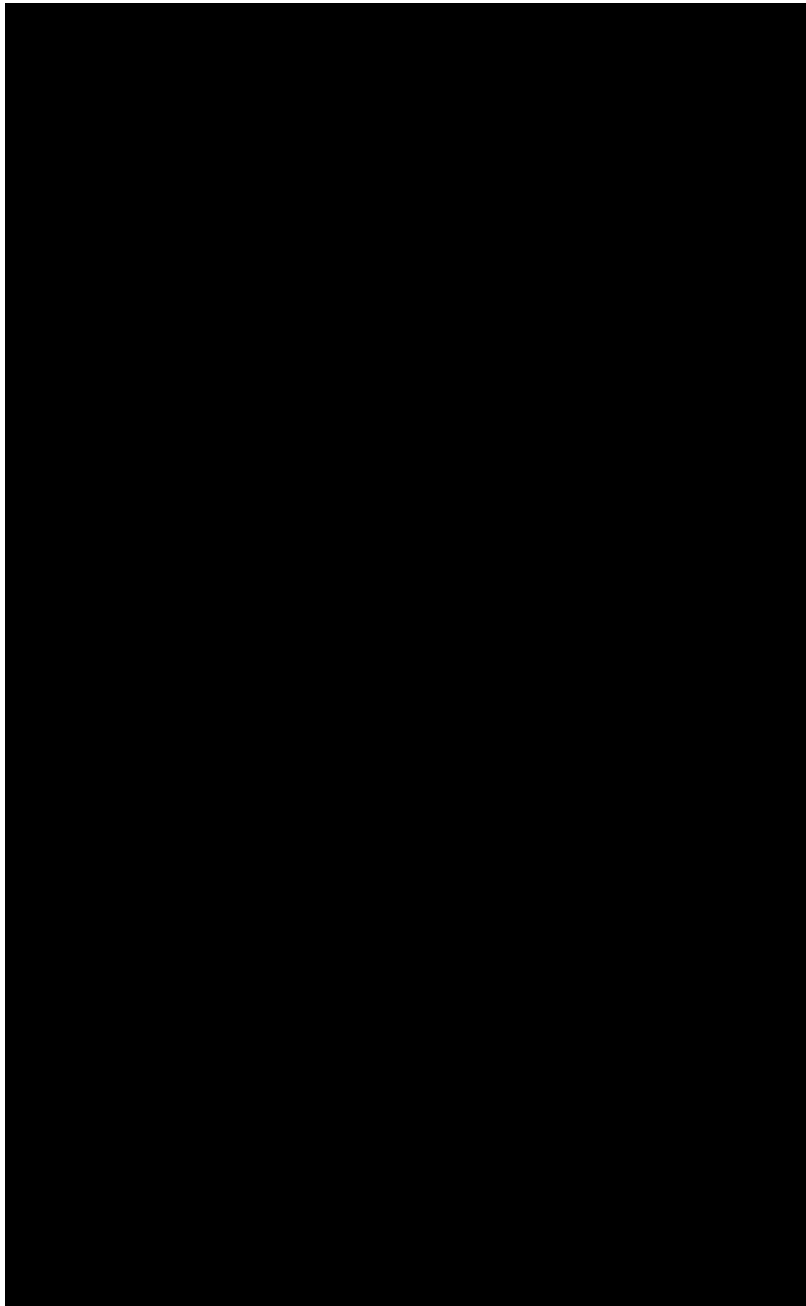


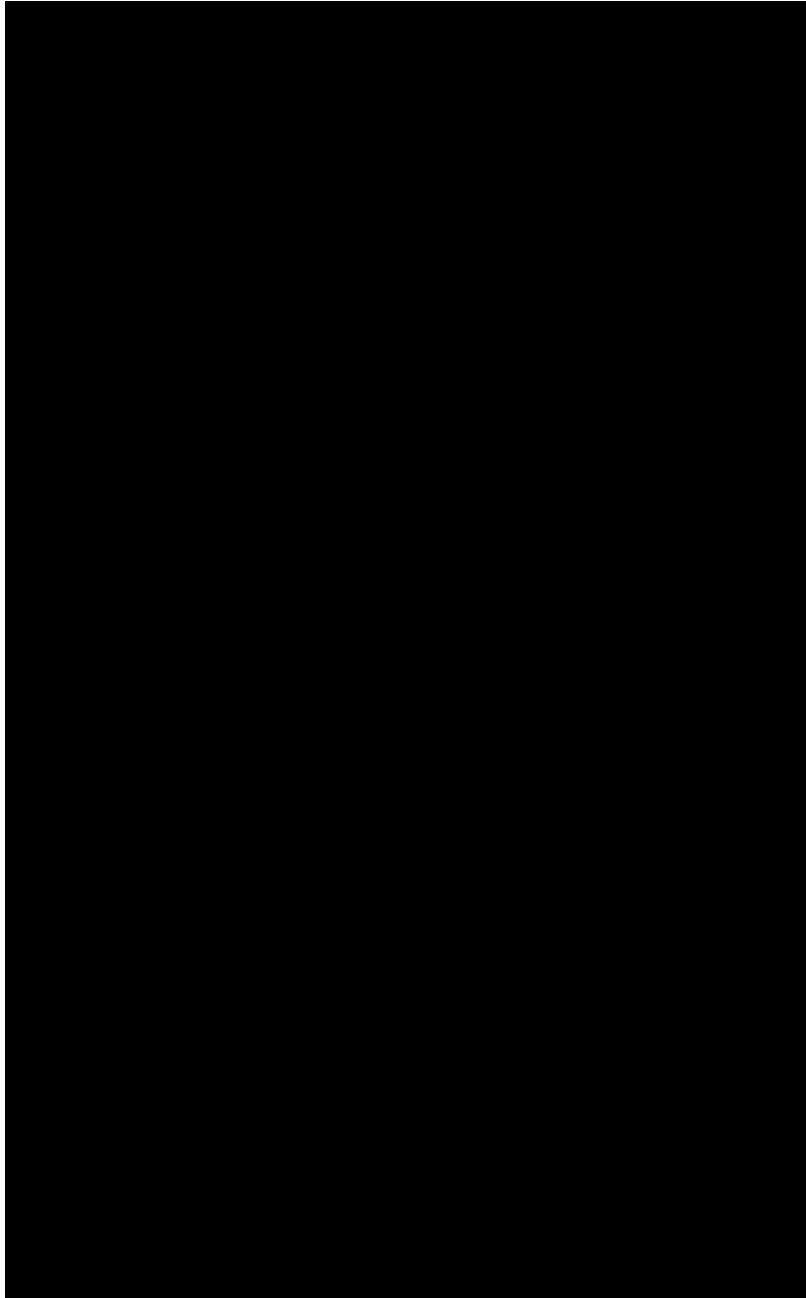


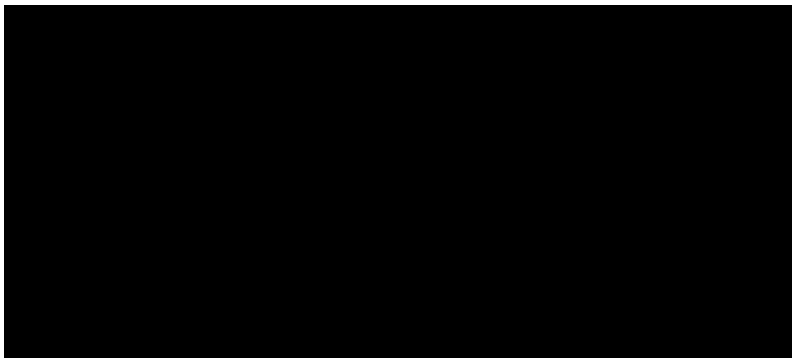












ii. 2011 Waltham Murders

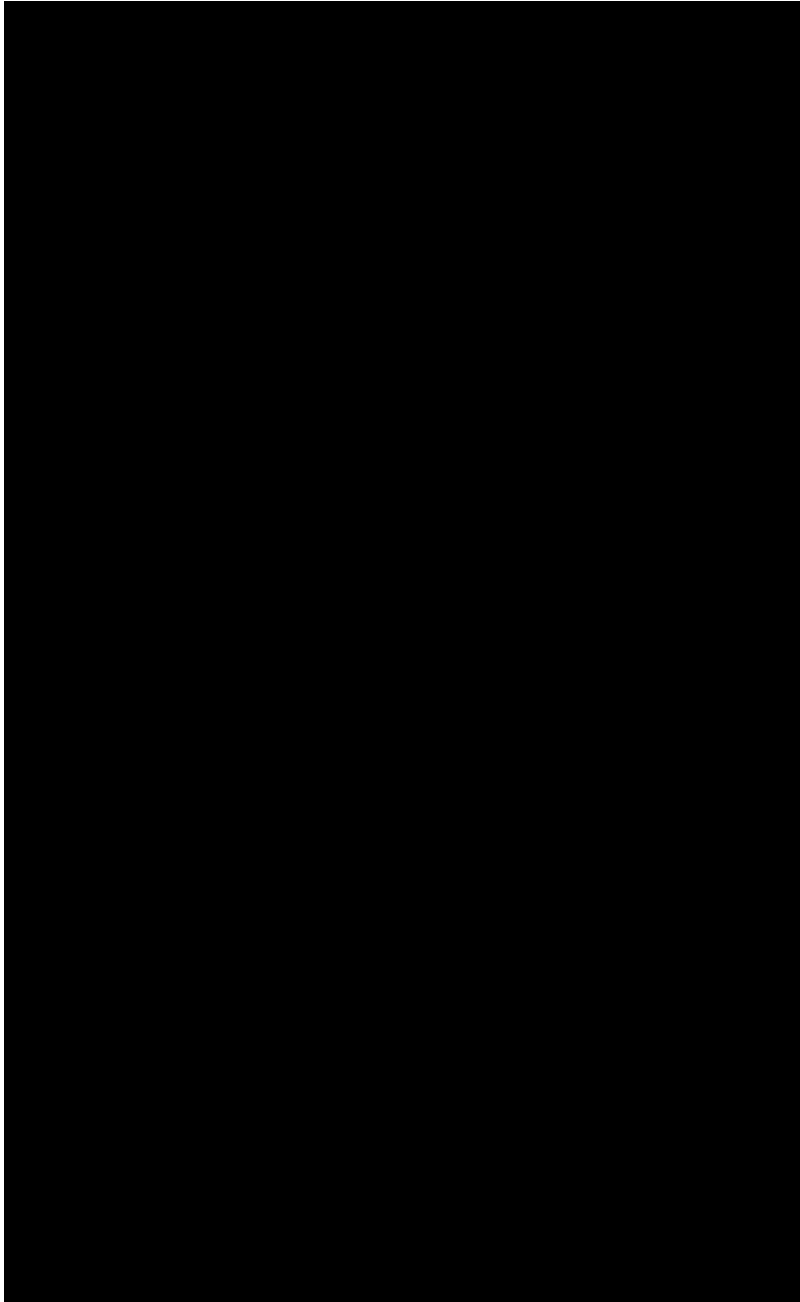
38. On the evening of September 11, 2011, three young men were killed at a residence at 12 Harding Avenue, Waltham, Massachusetts. One of the victims, Brendan Mess, Russell described as Tamerlan's very close friend. The murders were particularly grisly: the victims were bound, beaten, and had their throats cut. In addition, the victims were covered with marijuana. [REDACTED]

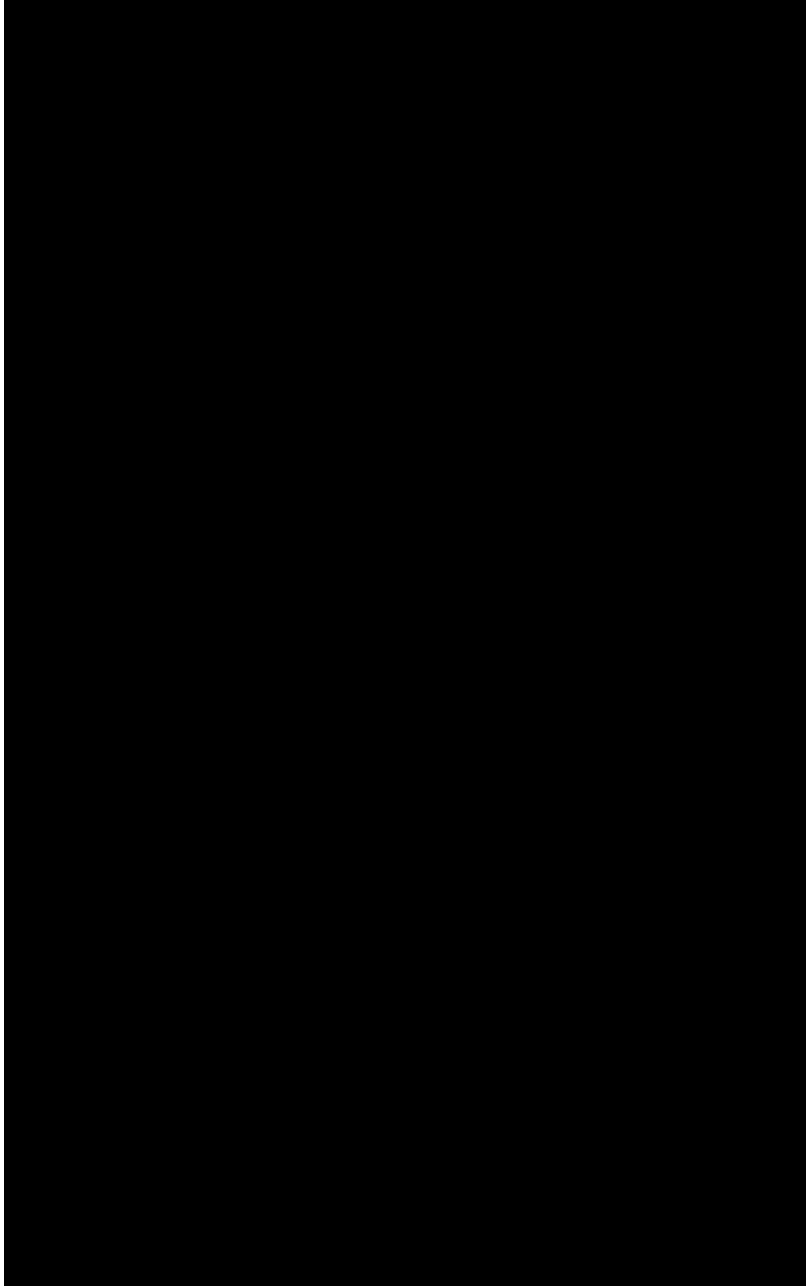
39. On May 21, 2013, as referenced above, law enforcement agents interviewed Todashev. Todashev confessed that he and Tamerlan participated in the Waltham murders. He said that he and Tamerlan had agreed initially just to rob the victims, whom they knew to be drug dealers who sold marijuana. Todashev said that he and Tamerlan took several thousand dollars from the residence and split the money. Todashev said that Tamerlan had a gun, which he brandished to enter the residence. Tamerlan decided that they should eliminate any witnesses to the crime, and then Todashev and Tamerlan bound the victims, who were ultimately murdered. Todashev went on to say that after the murders, Tamerlan and Todashev tried to clean the crime scene

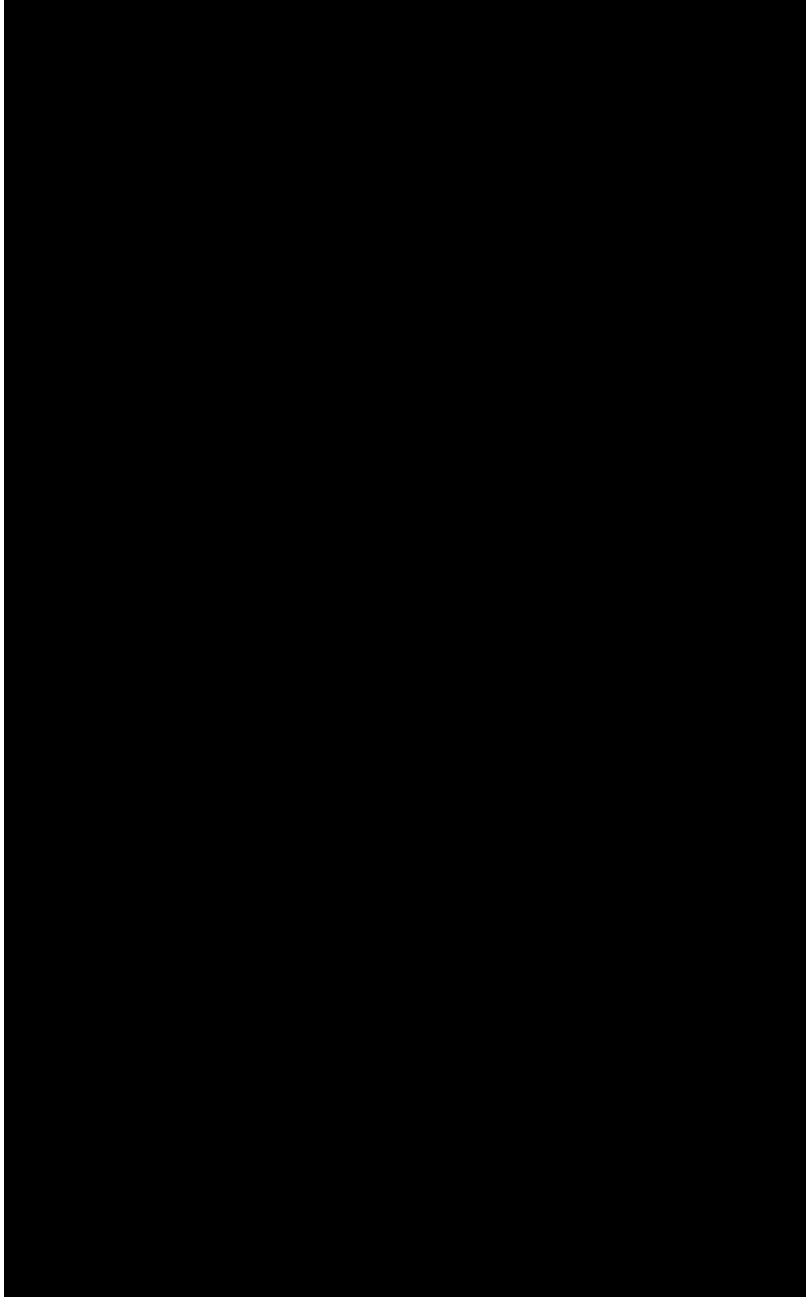
in order to remove traces of their fingerprints and other identifying details. [REDACTED]

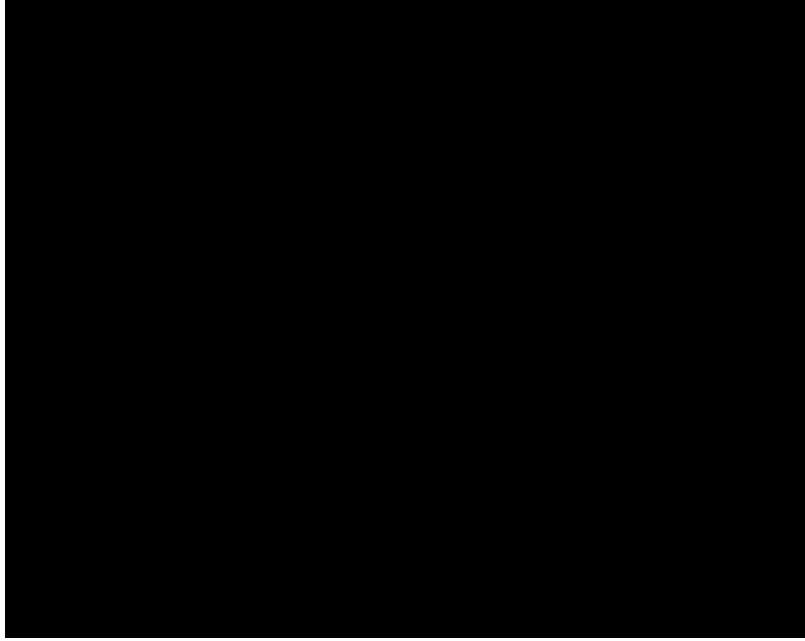
[REDACTED] Todashev said that they spent over an hour cleaning the scene. Todashev said that Tamerlan had picked Todashev up in the Target Vehicle and they traveled to the scene of the Waltham murders together. After the robbery and murder, they left the scene in the Target Vehicle.

[REDACTED]









ATTACHMENT A

PREMISES TO BE SEARCHED

The location to be searched is a **1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9.** The vehicle has been previously searched by the FBI, and was seized from across the street from 410 Norfolk Street, Apartment 3, Cambridge, Massachusetts, the residence of Tamerlan and Dzhokhar Tsarnaev.

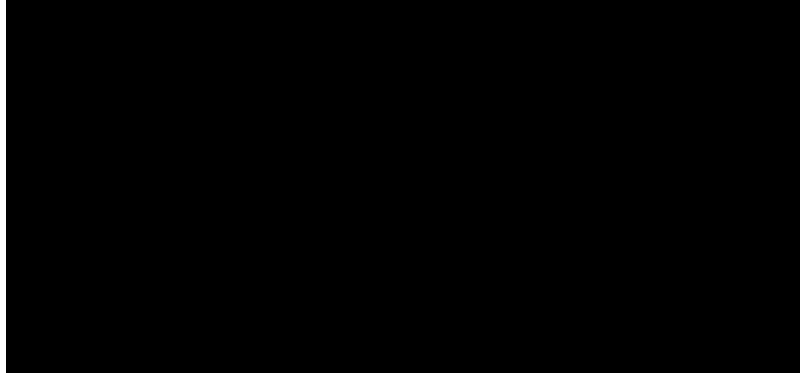
ATTACHMENT B
ITEMS TO BE SEIZED

Evidence, in whatever form inside or on the Target Vehicle, related to violations of 18 U.S.C. § 1951 (Robbery Affecting Interstate Commerce), 18 U.S.C. § 1519 (Obstruction of Justice), 18 U.S.C. § 924(c) (Use of a Firearm during a crime of violence), 18 U.S.C. § 1001 (Providing False Material Information), and 371 (Conspiracy to Commit Offenses), in connection with the robbery and triple murder in Waltham, Massachusetts in 2011, including:

1. Blood, tissue, DNA, hair and bodily fluids samples;
2. Fibers and portions of surfaces containing fibers;
3. Swatches of carpet, upholstery, fabric, wood, plastic metal and any other surface or under-surface anywhere on or in the vehicle;
4. Any absorbent substrate or materials;
5. Property, records, or information related to the September 2011 Waltham triple homicide;
6. Property, records, or information related to the state of mind and/or motive of Tamerlan Tsarnaev or Ibragim Todashev or others to undertake the September 2011 Waltham triple homicide;
7. Property, records, or other information related to contacts between Ibragim Todashev and Tamerlan Tsarnaev or Dzhokhar Tsarnaev or other co-conspirators;

8. Property, records, or other information, related to travel of the vehicle or Tamerlan Tsarnaev or Ibragim Todashev in September 2011;

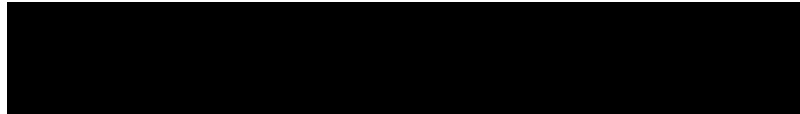
9. Property, records, or information related to any bank records, checks, credit card bills, account information, and other financial records;



12. Chemical and physical testing of the vehicle.

13. Evidence of property, records, or information related to the victims of the September 2011 Waltham triple homicide, Brendan Mess, Erik Weissman, or Raphael Teken, or related to Tamerlan or Dzhokhar, or an as yet-unidentified co-conspirator;

14. Property, records, or other information related to martial arts, combat, or fighting;



16. Evidence not previously seized, evidencing a relationship between the 2011 Waltham triple homicide and the 2013 Boston Marathon bombings.

UNITED STATES DISTRICT COURT

for the District of Massachusetts

In the Matter of the Search of (Briefly describe the property to be searched or identify the person by name and address)

1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9

Case No. 13-MJ-2224-MBB

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the District of Massachusetts (Identify the person or describe the property to be searched and give its location):

1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9, as described in Attachment A

The person or property to be searched, described above, is believed to conceal (Identify the person or describe the property to be seized): evidence, fruits and instrumentalities of violations of 18 U.S.C. §1951 (Robbery Affecting Interstate Commerce), 18 U.S.C. §1519 (Obstruction of Justice), 18 U.S.C. § 924(c) (Use of a Firearm during a crime of violence), 18 U.S.C. §1001 (Providing False Material Information), and 371 (Conspiracy to Commit Offenses), as described in Attachment B

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before June 17, 2013 (not to exceed 14 days)

[X] in the daytime 6:00 a.m. to 10 p.m. [] at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge Marianne B. Bowler (name)

[] I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2005 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person whose, or whose property, will be searched or seized (check the appropriate box) [] for days (not to exceed 30) [] until, the facts justifying, the later specific date of

Date and time issued: 06/03/2013 0:00 am 05:45 PM

Marianne B. Bowler, U.S.M.J. Judge's signature

City and state: Boston, Massachusetts

Hon. Marianne B. Bowler, U.S. Magistrate Judge Printed name and title

Return		
Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:
<i>Inventory made in the presence of :</i>		
<i>Inventory of the property taken and name of any person(s) seized:</i>		
Certification		
<i>I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.</i>		
Date: _____	_____	
	<i>Executing officer's signature</i>	

	<i>Printed name and title</i>	

ATTACHMENT A

PREMISES TO BE SEARCHED

The location to be searched is a **1999 gray Honda CR-V, bearing Massachusetts license plate number 316ES9.** The vehicle has been previously searched by the FBI, and was seized from across the street from 410 Norfolk Street, Apartment 3, Cambridge, Massachusetts, the residence of Tamerlan and Dzhokhar Tsarnaev.

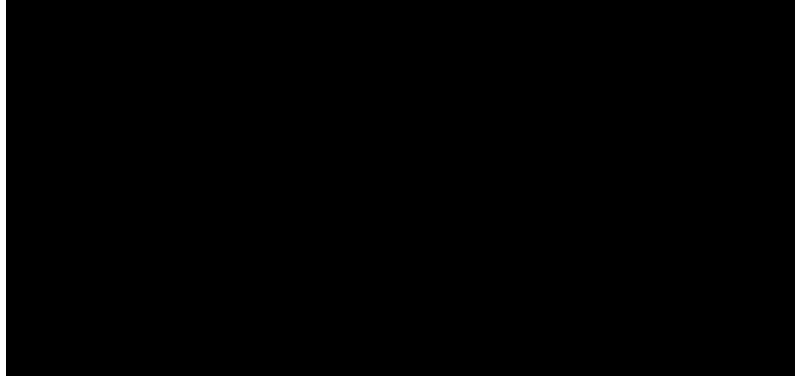
ATTACHMENT B
ITEMS TO BE SEIZED

Evidence, in whatever form inside or on the Target Vehicle, related to violations of 18 U.S.C. § 1951 (Robbery Affecting Interstate Commerce), 18 U.S.C. § 1519 (Obstruction of Justice), 18 U.S.C. § 924(c) (Use of a Firearm during a crime of violence), 18 U.S.C. § 1001 (Providing False Material Information), and 371 (Conspiracy to Commit Offenses), in connection with the robbery and triple murder in Waltham, Massachusetts in 2011, including:

1. Blood, tissue, DNA, hair and bodily fluids samples;
2. Fibers and portions of surfaces containing fibers;
3. Swatches of carpet, upholstery, fabric, wood, plastic metal and any other surface or under-surface anywhere on or in the vehicle;
4. Any absorbent substrate or materials;
5. Property, records, or information related to the September 2011 Waltham triple homicide;
6. Property, records, or information related to the state of mind and/or motive of Tamerlan Tsarnaev or Ibragim Todashev or others to undertake the September 2011 Waltham triple homicide;
7. Property, records, or other information related to contacts between Ibragim Todashev and Tamerlan Tsarnaev or Dzhokhar Tsarnaev or other co-conspirators;

8. Property, records, or other information, related to travel of the vehicle or Tamerlan Tsarnaev or Ibragim Todashev in September 2011;

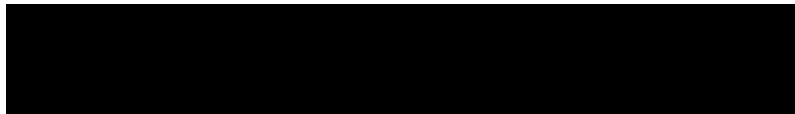
9. Property, records, or information related to any bank records, checks, credit card bills, account information, and other financial records;



12. Chemical and physical testing of the vehicle.

13. Evidence of property, records, or information related to the victims of the September 2011 Waltham triple homicide, Brendan Mess, Erik Weissman, or Raphael Teken, or related to Tamerlan or Dzhokhar, or an as yet-unidentified co-conspirator;

14. Property, records, or other information related to martial arts, combat, or fighting;



16. Evidence not previously seized, evidencing a relationship between the 2011 Waltham triple homicide and the 2013 Boston Marathon bombings.